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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondent has opposed the Petition for a Writ of Certiorari on three separate grounds; viz., that the federal question was not properly presented to the Courts below; that the decision of this Court in *Boykin v. Alabama*, 395 U.S. 238 (1969) should not be applied retroactively, and that the procedures employed by the trial court were adequate for a determination that petitioner's plea of guilty was voluntar-

ily and understandingly entered. This reply will deal briefly with each of these arguments in the order in which they were raised.

I. The Underlying Principles Which Support Petitioner's Request for Relief in this Court were Raised by Petitioner's Motion for a New Trial filed in the Trial Court

Respondent's argument that the federal issues presented to this Court by Petitioner were not properly presented to the lower courts is founded upon an overly narrow view of the factual basis for the constitutional issues raised in the petition. It is obvious that since *Boykin v. Alabama,* 395 U.S. 238, was not decided until June 2, 1969, some three weeks after petitioner's final pleading was filed in the Tennessee Supreme Court, he cannot be denied relief in this Court for failing to cite *Boykin* to the Tennessee Courts. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 143 (1967). The substantive question presented by the petition is not whether the trial court was required to exercise the extraordinary foresight necessary to apply the procedural requirements of *Boykin* to the instant case, but, whether, under the circumstances, petitioner's plea of guilty can be assumed to have been voluntarily and knowingly entered. If an examination of all of the circumstances surrounding the plea does not assure the Court that the plea was entered voluntarily, petitioner must be granted leave to withdraw it, for our Courts have long been "careful that a plea of guilty shall not be accepted unless made voluntarily . . ." *Kercheval v. United States,* 274 U.S. 220, 223 (1927).

Thus, a determination of whether or not the federal question was properly raised must be analyzed in terms of petitioner's assertions below that his plea was not voluntary but was the result of coercion arising out of a desire to protect his son and the prosecution's insistence that the son would be treated lightly only if petitioner also plead guilty. As respondent points out in its Brief in Opposition, petition-

er's sixth assignment of error in his Motion for a New Trial, filed with the trial court, is as follows:

> "6. The defendant entered a plea of guilty in order to obtain a smaller sentence for his son notwithstanding the fact that he was not guilty of any intentional wrongdoing."

At the hearing on the Motion for a New Trial,[1] counsel for petitioner argued that at the time petitioner decided to enter his plea "his son stood to be convicted for twenty-one years in the penitentiary" . . .and "[t]his man in an effort to reduce his son's sentence entered his [own] plea." (Arg. 4.) The trial judge obviously understood the basis for petitioner's claim of coercion because he asked a question regarding the circumstances of the plea bargain and counsel for the state quite candidly admitted that the state would not have allowed petitioner's son to plead to a lesser offense and receive a smaller sentence if petitioner had not also agreed to plead guilty. (Arg. 12.)[2]

In appealing the denial of his Motion for a New Trial to the Tennessee Court of Criminal Appeals and from that Court to the Supreme Court of Tennessee, petitioner repeated the sixth assignment of error from his Motion for

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[1] Petitioner was not obliged to raise these questions at the time he entered his plea since he wished to have his plea accepted at that time in order to aid his son and thus could be expected to "cover-up" any constitutional infirmities. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

[2] Respondent's objection that the transcript of the argument "was never even offered for filing, much less filed in any Court in the State of Tennessee" is not well founded. The admissions of counsel for the state relied upon in this Court *were addressed to the trial court* in answer to a question from the bench. (Arg. 11-12). Thus, the trial court had the full benefit of these admissions and had every opportunity to act accordingly. The Court's question and the admission were quoted *verbatim in every major pleading filed by petitioner in both of the Tennessee appellate courts.* Thus, there is no basis for respondent's claim that this "evidence" was not presented to the Tennessee Courts. *Cf. Lear, Inc. v. Adkins*, 395 U.S. 653, 657, footnote 1 (1969)

a New Trial and quoted verbatim the trial judge's question and the prosecutor's answer from pages 11 and 12 of the transcript of oral argument held on the new trial motion in every pleading[3] directed to the merits of his cause. It may be that the quote contained in respondent's brief from petitioner's "Petition to Rehear Petition for Certiorari" filed in the Supreme Court of Tennessee on May 13, 1969 is a somewhat more artfully phrased statement of petitioner's argument, but the legal and factual basis for the relief were also clearly contained in prior pleadings.

In ruling on the adequacy of a litigant's efforts to raise a federal issue in the lower courts, this Court has declined to force litigants to adopt an "arid ritual of meaningless form"[4] and, instead, has ruled that an effort which

> "is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests and therefore sufficient to preserve the claim for review here." *Douglas v. Alabama,* 380 U.S. 415, 422 (1965).

Viewed in the light of this standard, respondent's arguments that the federal question was inadequately raised below is without merit and should not bar review by this Court of the substantial and timely questions raised by the treatment petitioner has received from the Courts of Tennessee.

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[3] "Petition for Certiorari and Supersedeas" and "Statement of the Case, Assignments of Error" filed March 27 and April 24, 1968, respectively, in the Tennessee Court of Criminal Appeals; and "Certiorari and Supersedeas Petition, Assignment of Errors and Brief" filed March 12, 1969 in the Supreme Court of Tennessee.

[4] *Staub v. City of Baxley,* 355 U.S. 313, 320 (1958); quoted in *Henry v. Mississippi,* 379 U.S. 449, 568 (1965).

II. The Petition Should be Granted in Order to Provide the Court With an Opportunity to Decide Whether *Boykin v. Alabama* Should be Applied Retroactively

As respondent points out in Part II of its argument, the petitioner has requested this Court to apply retroactively the rationale of *Boykin v. Alabama,* 395 U.S. 238 (1969) to the facts in the instant case. Although, as set forth below, the instant case involves a fact situation which raises constitutional questions clearly decided prior to the release of *Boykin,* the issuance of the writ prayed for would provide this Court with an opportunity to consider on the merits the question of whether *Boykin* should be decided retroactively.

This Court has ruled that retroactivity can only be determined "in each case 'by looking to the peculiar traits of the specific rule in question'." *Johnson v. State of New Jersey,* 384 U.S. 719, 728 (1966), quoting from *Linkletter v. Walker,* 381 U.S. 618, 629 (1965) and *Tehan v. United States, ex rel Shott,* 382 U.S. 406, 410 (1966). Detailed criteria for determining the retroactivity of newly announced constitutional principles were set forth in *Stovall v. Denno,* 388 U.S. 293 (1967). The weighing of these criteria can only be accomplished through careful scrutiny after full briefing and argument. To date, a number of courts have ruled that the procedural rules announced in *Boykin* should not be applied retroactively.[5] However, several other Courts have cited *Boykin* and applied its rationale in permitting defendants to withdraw guilty pleas without discussing the question of retroactive application. See *United States v. Lucia,* Nos. 26316-7, U.S. App. 5th

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[5] *Illinois v. Williams,* Supreme Court of Illinois, No. 42045, released January 28, 1970; *Arizona v. Griswold,* 147 P.2d 331 (S. Ct. of Arizona); *Bishop v. Langlois,* 256 A.2d 20 (S. Ct. of Rhode Island); *United States ex rel Hughes v. Rundle,* 419 F.2d 116 (3d Cir., 1969); *Commonwealth v. Godfrey,* 254 A.2d 923 (S. Ct. of Pa., 1969); *Montayne v. State,* 256 A.2d 706 (Ct. Spec. Crim. App. of Md., 1969); *Jenkins v. United States,* U.S. Ct. of App. for the Tenth Cir., released January 2, 1970; *In re Tahl,* 460 P.2d 449 (St. Ct. of Cal., 1969).

Cir., released September 17, 1969; *State v. Sisco,* 169 N.W.2d 542 (S. Ct. of Iowa, 1969); *Phillips v. Smith,* 300 F. Supp. 130 (D.C.S.D. Ga., 1969). There is also an apparent conflict concerning the constitutional requirements which governed the acceptance of guilty pleas prior to *Boykin.* See detailed discussion of the problem in *Commonwealth v. McBride,* S. Ct. of Pa., No. 415, released January 30, 1970, and *In re Tahl,* 460 P.2d 449 (S. Ct. of Cal., 1969). Under these circumstances, the Court should grant the petition in the instant case in order to consider and resolve the conflicting questions which have arisen from the differing interpretations of *Boykin* by various state and federal courts.

III. Respondent's Arguments that the Procedures Employed by the Trial Court were Adequate to Protect Petitioner's Constitutional Rights Reflect the Current Confusion over the Constitutionality of the Process of Plea Bargaining

In Part III of its Argument, Respondent suggests that the procedures adopted by the trial court were regular on their face and that the explanations given to the Court by petitioner's attorney and the prosecutor somehow relived the Court of its duty to determine the voluntariness of petitioner's plea. Constitutional principles enunciated prior to *Boykin* clearly required a full inquiry into the facts surrounding the plea bargain when the unusual nature of the mutually contingent pleas became obvious. The Supreme Court of Pennsylvania recently discussed the *pre-Boykin* requirements for accepting a guilty plea in *Commonwealth v. McBride,* where it stated.[6]

> ". . . while *Boykin's* remedy is a new one, and will not be retroactively applied, there is nothing new about *Boykin's* conception of waiver, based as it is on the 1938 decision of *Johnson v. Zerbst, supra.* The definite implication of *Halliday,*

[6]No. 415 January Term, 1969, filed January 30, 1970. The quote was taken from pages 4 and 5 of a typewritten advance opinion.

combined with the emphasis on the *Johnson v. Zerbst* waiver standard in *McCarthy* and *Boykin*, is that to satisfy due process in pre-*Boykin* silent record cases, the government must carry the burden of demonstrating a knowing and intelligent guilty plea.

"Indeed this is where the burden had been placed by all federal circuits which had considered the matter, even before *McCarthy* and *Boykin*. In particular, the Third Circuit has held that in silent record cases the Commonwealth has the burden of proving voluntariness: '[I]t should be pointed out that the strong presumption of constitutional regularity which attaches to a State court conviction when collaterally attacked, may be overcome where there is no record of the state court proceedings [at the time the plea was accepted] or where such a record does exist, but shows that the trial court did not properly question the defendant on accepting his plea.' Relying on *Kercheval v. United States*, the court then concluded that 'the Commonwealth had the burden of proving that appellant's guilty pleas were voluntary.' *United States ex rel McCloud v. Rundle*, 402 F.2d 853, 857, 858 (3d Cir. 1968)." (Footnotes omitted.)

Thus, in the instant case, the burden was on the State to show that petitioner's plea was voluntary, and, since the State declined to assume this burden at the hearing on the Motion for a New Trial, petitioner should have been permitted to withdraw his plea of guilty.

Although the potentially coercive elements of the bargain were quite obviously present in the instant case, the great majority of guilty pleas result from bargains which are never closely examined on the record by a judicial officer. As pointed out in the petition in the instant case, confusion surrounds the question of what procedural safeguards, if any, are necessary to assure the constitutional rights of a defendant who enters into a bargain with the

prosecutor for a lesser charge or sentence than he might be expected to obtain if found guilty after a trial. The summary procedures employed by the Courts below, both in accepting petitioner's guilty plea and in reviewing the plea on appeal are evidence of this confusion. Respondent's reliance upon the statements of the prosecutor and petitioner's counsel at the time the plea was entered further point up the lack of understanding which surrounds the need to closely examine bargained pleas of guilty. It is precisely because petitioner, his counsel and the prosecutor all desired to have the plea accepted that the trial judge as the only disinterested party to the proceeding should have conducted an independent inquiry into the background of the bargain.

This Court's recent decisions in *Boykin*, *McCarthy v. United States*, 394 U.S. 459 (1969) and *Jackson v. United States*, 390 U.S. 570 (1968) have stimulated a discussion of the procedures necessary to protect defendants who plead pursuant to bargains made with the prosecution. In concurring with a majority decision holding that *Boykin* should not be applied retroactively, Justice Peters of the California Supreme Court indicated in *In re Tahl*, 460 P.2d 499, ___, (1969):

> "[T]hat the realities of criminal justice demand a more basic reform of plea procedures than that undertaken by the majority if we are to serve the laudable objectives of *Boykin*. A trial judge cannot meaningfully assess the voluntariness of a guilty plea, and the record of plea proceedings cannot fairly preclude a claim of the plea's invalidity, as long as defendants are expected to hide the most common motivation for such pleas: plea bargains. I would require that all plea bargains be set forth on the record and that defendants be fully advised of the possible consequences of the bargain they have entered."

Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit, discussed the

matter at some length in his opinions in *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969),[7] and *Prettyjohn, v. United States*, U.S. App. D.C. No. 21666, November 17, 1969.[8] In *Scott*, Judge Bazelon said: "the difficulties that practice [plea bargaining] presents are exceeded only by its pervasiveness" (419 F.2d at 271). In *Prettyjohn*, he concluded that a request for an *en banc* hearing should have been granted for the purpose of considering the "difficult but important questions concerning the standards to be used by the District Courts in accepting or rejecting bargained pleas of guilty" (Slip Opinion, p. 2). He argued that:

> "If plea bargaining is constitutional, it should not go unsupervised. Yet the present state of the law places even the most conscientious trial judge in a difficult position. * * * The problem is that by remaining silent on the constitutionality of plea bargaining, we do not provide any indication that further inquiry might have validated the plea. If we are to uphold bargained pleas, I think we must also delineate the power and the duty of trial courts, faced with a situation such as the present one, to conduct a further inquiry." (Slip Opinion, pp. 6-7, footnotes omitted.)

Since the record in the instant case contains a fact situation in which the key considerations leading to a plea bargain are clearly set forth, the issuance of a writ of certiorari would give the Court an appropriate vehicle for examining and deciding the important constitutional questions presented by the plea bargaining processes which are so common in criminal trial courts throughout the United States.

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[7] Although concurring in the result reached, the two other judges on the *Scott* panel filed separate opinions. See 419 F.2d at 279 and 281.

[8] Chief Judge Bazelon's opinion was a statement of his reasons for voting for rehearing *en banc* in a case where the other members of the Court had denied a request for rehearing *en banc* in a per curiam order.

CONCLUSION

For the reasons set forth above the Petition for a Writ of Certiorari should be granted.

Respectively submitted,

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